Citation: *M. C. v. Minister of Employment and Social Development*, 2014 SSTAD 52

Appeal No. AD-13-19

BETWEEN:

M. C.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: HAZELYN ROSS

DATE OF DECISION: March 28, 2014

DECISION: LEAVE REFUSED

DECISION

1. The application for leave to appeal is refused.

INTRODUCTION

2. By a decision issued May 17, 2013, a Review Tribunal determined that a Canada Pension Plan disability pension was not payable to the Applicant. The Applicant has filed an Application for Leave to Appeal the decision of the Review Tribunal, (the "Application").

GROUNDS OF THE APPLICATION

3. Counsel for the Applicant submits that the Review Tribunal fell into error by failing to give proper consideration to the Applicant's medical evidence, including the expert medical opinion of Dr. J. Gouws. The Applicant also asserts that in assessing her ability to work the Review Tribunal based its decision on erroneous facts.

ISSUE

4. The only issue for the Tribunal to decide is whether, without considering the merits of the application, the appeal has a reasonable chance of success.

THE APPLICABLE LAW

5. The relevant statutory provisions are found in ss. 56(1), 58(2) and 58(3) of the *Department of Human Resources and Skills Development Act*, (the DHRSD Act). s.56 (1) clarifies that there is no automatic right to an appeal. Thus, an Applicant must seek and obtain leave to bring his or her appeal before the Appeal Division. s.58 (3) of the DHRSD Act mandates that "the Appeal Division must either grant or refuse leave to appeal" while ss.58 (2) sets out on what basis leave to appeal is refused. Leave will be refused where the Appeal Division is not satisfied that the appeal has a reasonable chance of success. The jurisprudence establishes that the test

for whether leave should be granted is whether there is an arguable case.[1] The Applicant must raise some arguable ground upon which the proposed appeal might succeed.[2] In *Carroll,* O'Reilly J[3] stated that an Applicant "will raise an arguable case if she puts forward new or additional evidence (not already considered by the Review Tribunal); raises an issue not considered by the Review Tribunal; or can point to an error in the Review Tribunal's decision.

ANALYSIS

6. The Applicant did not put forward any new evidence to support the Application. Neither has the Applicant raised an issue not considered by the Review Tribunal. Instead, the Applicant's Counsel urges upon the Tribunal the position that the Review Tribunal failed either to assess or to properly assess the medical evidence, in particular the expert evidence of Dr. Gouws. The Applicant's counsel submits that the medical evidence supports a finding of a severe and prolonged disability.

7. The Tribunal has examined the documents submitted on the behalf of the Applicant. The Tribunal has also considered the decision of the Review Tribunal. The Tribunal finds that while the Review Tribunal did not specifically refer to every piece of medical evidence that was before it, it did conclude that the Applicant's testimony was "not wholly consistent with the physical and medical evidence." In the Tribunal's view, this statement is consistent with the inference that the Review Tribunal did consider all of the medical evidence that was before it at the hearing.

8. While aware that a Tribunal does not have to refer to each and every piece of evidence in its decision, nonetheless, given its importance, the absence of a specific reference to Dr. Gouw's psychological report and the conclusions therein leaves open the possibility that the Review Tribunal did not consider the report and its content during its deliberations.

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[1] *Calihoo v. Canada (Attorney General),* [2000] FCJ No. 612 TD at para. 15.
[2] *Canada (Attorney General) v. Zakaria,* 2011 FC 136 at para. 37.
[3] *Canada (Attorney General) v. Carroll,* 2011 FC 1092.

9. Notwithstanding this possibility, the Tribunal has considered the question of the impact of this particular medical report on the outcome of the hearing. The medical report was prepared some fourteen months after the Minimum Qualifying Period, and in the Tribunal's view it likely would have had little impact on the outcome of the hearing coming as it does after the Minimum Qualifying Period. Thus the Tribunal finds that it is not satisfied that the appeal has a reasonable chance of success. Accordingly, the Tribunal would refuse the Application for Leave.

CONCLUSION

10. The Application for Leave to Appeal is refused.

Hazelyn Ross

Member, Appeal Division